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Supreme Court, U.S.
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No. 98 2002 JUN 14 1999

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In The

Supreme Court of the United States

STEVEN BALOGH and
KENOVA CONSTRUCTION CORPORATION,

Petitioners,

vs.

RICARDO RAMOS,

Respondent.

On Petition For Writ Of Certiorari To The Texas Court Of Appeals For The Thirteenth Judicial District Of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. The state trial court set a trial date during a telephone conference call placed by Ramos' counsel, who excluded Balogh and Kenova from the conference by misrepresenting to the court that their telephone numbers were not available. Receiving no notice of the trial setting, Balogh and Kenova did not appear for trial. The state court rendered judgment for Ramos and denied Balogh's and Kenova's motion for a new trial. Did the trial court's judgment and denial of a new trial violate Balogh's and Kenova's federal constitutional rights to due process?

2. Despite finding that Balogh and Kenova did not receive notice of the trial, the state appellate court affirmed the denial of a new trial because it found Balogh and Kenova failed to prove also that their absence from trial was not intentional or the result of conscious indifference – a state procedural requirement for a new trial after a post-answer default judgment. May the state court's requirements for granting a new trial supersede the defendants' federal constitutional rights to due process?

LIST OF ALL PARTIES

Petitioners:

Steven Balogh

Kenova Construction Corporation

Kenova Construction Corporation has no parent company or non-wholly owned subsidiaries.

Respondent:

Ricardo Ramos

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Balogh v. Ramos, 978 S.W.2d 696 (Tex. App. – Corpus Christi 1998, pet. denied).

STATEMENT OF THE BASIS FOR JURISDICTION

Pursuant to 28 U.S.C.A. § 1257 (West 1993), the Supreme Court has jurisdiction of this matter because Petitioners seek enforcement of their rights and privileges under the United States Constitution. Review on a writ of certiorari is appropriate because the Texas Court of Appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court.

This Petition is filed within 90 days after the Texas Supreme Court's March 18, 1999 decision overruling Petitioners' motion for reconsideration of the denial of their petition for discretionary review in the Texas Supreme Court. [App. E at 30].

The trial court granted judgment on April 28, 1997 [App. F at 31], and denied Petitioners' motion for new trial [App. N at 57] on September 19, 1997. [App. G at 34]. The Texas Court of Appeals initially rendered judgment on May 21, 1998. [App. B at 19]. The court of appeals issued a substitute opinion and judgment on October 1, 1998 [App. A at 1], and denied Petitioners' Motion for Further Rehearing on November 12, 1998. [App. C at 28]. The Texas Supreme Court denied the Petitioners' Petition

for Review on January 28, 1999 [App. D at 29], and overruled their Motion for Reconsideration on March 18, 1999. [App. E at 30].

CONSTITUTIONAL PROVISIONS INVOLVED

1. U.S. CONST., art. VI, cl. 2:

> This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.

2. U.S. CONST., amend. XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Ricardo Ramos sued Steven Balogh and Kenova Construction Corporation for breach of contract and fraud after Balogh and Kenova allegedly stopped payment on a

$5,000.00 check. [App. A at 3-5]. *Balogh v. Ramos*, 978 S.W.2d 696, 698 (Tex. App. – Corpus Christi 1998, pet. denied). After Balogh and Kenova entered their appearances in this case, the trial court notified the parties that a telephonic docket control conference was to be held, and that Ramos' counsel, Carlos Quintana, was required to initiate the telephone conference call "if one is necessary." [App. I at 38]. *Id.* at 699. Ramos' counsel initiated the telephone call but misrepresented to the state court that no telephone number was available for Balogh and Kenova. [App. B at 25-26; App. H at 36; App. J at 41].

The trial court's docket sheet reflects that "Elizabeth" from Quintana's office participated in the telephone conference, and that nobody participated in the conference on behalf of Balogh and Kenova. [App. H at 36]. According to the docket sheet, Elizabeth informed the court that no telephone number was available for Balogh and Kenova. [App. H at 36]. This representation to the Court was false. Not only did Quintana have telephone numbers for Balogh and Kenova, [App. M at 53-54], those numbers are correctly stated in pleadings, exhibits, and affidavits that Ramos filed with the Court before the date of the docket control conference. [App. B at 25-26].

After the docket control conference, the trial court issued a Docket Control Order setting this case for trial on March 17, 1997. [App. J at 40-41]. The Docket Control Order confirms that the court made no effort to call Balogh and Kenova to participate in the telephone conference due to Elizabeth's representation that no phone number was available. [App. J at 41]. The Docket Control Order was never served on Balogh and Kenova. [App. M]. Unlike the order setting the docket control conference

and the accompanying letter, both of which show that they were sent to Balogh, the Docket Control Order has no notation that it was mailed to Balogh or Kenova. [App. J at 41; App. B at 26-27]. The court of appeals, in both its original opinion [App. B at 27] and its substituted opinion [App. A at 7], unequivocally found that Balogh and Kenova had not received notice of the trial. *Balogh*, 978 S.W.2d at 699.

The Docket Control Order also orders mandatory mediation of the dispute no later than 15 days before the trial date. [App. J at 40]. Balogh and Kenova would have welcomed the opportunity to mediate the dispute, but never received notice of the order requiring mediation. [App. M at 53, 55-56]. Ramos made no effort to contact Balogh or Kenova to discuss mediation, and took no action to comply with the order for mandatory mediation. [App. M at 53, 55].

On February 21, 1997, approximately six weeks after the trial court set the March 17, 1997 trial date, Ramos served a set of Requests for Admissions on Petitioners, instructing them to provide answers by March 21, 1997, *four days after the scheduled trial*. [App. K at 42-43]. Unaware of the trial setting, Petitioners served Ramos with answers to this discovery process. [App. L at 49-50]. Ramos could have only one apparent purpose for serving discovery process that required Petitioners to serve answers after the case was scheduled to be tried: to make certain the Petitioners would not suspect that the case was about to be tried without their knowledge.

With no notice of the trial, Balogh and Kenova did not appear. The state court conducted the trial *ex parte*

[App. H at 36-37], and rendered judgment against Balogh on April 28, 1997 for $133,750.00, including $100,000.00 in punitive damages. [App. F at 31-32].

Under Texas precedent, a defendant who seeks to vacate a default judgment and obtain a new trial must prove three elements (1) the defendant's failure to appear or answer was "not intentional, or the result of conscious indifference on his part, but was due to a mistake or accident," (2) "the motion for new trial sets up a meritorious defense," and (3) granting a new trial "will occasion no delay or otherwise work an injury to the plaintiff." *Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d 124 (Tex. 1939). The *Craddock* test also applies when a defendant seeks to set aside a post-answer default judgment, rendered when the defendant has filed an answer but fails to appear for trial. *Lopez v. Lopez*, 757 S.W.2d 721, 722 (Tex. 1988).

After Balogh and Kenova received notice of the judgment against them, they filed a motion to vacate the judgment and for new trial, which set forth evidence of the *Craddock* elements and asserted that Balogh and Kenova were entitled to a new trial without proof of the *Craddock* elements because the judgment without notice violated their due process rights under the United States Constitution. [App. N at 62, 64, 67]. The trial court denied the motion for new trial [App. G at 34], so Balogh and Kenova appealed the judgment to the Texas Court of Appeals.

On appeal, Balogh and Kenova asserted the violation of their rights to due process under the United States Constitution. The court of appeals originally reversed the

trial court's judgment on the basis that their federal rights to due process had been violated because they had not received notice of the trial setting. [App. B at 27]. The original opinion by the court of appeals acknowledged the supremacy of federal law over the state law's *Craddock* test: "if the record establishes a defendant does [sic] not receive notice of the trial setting, it violates due process to require the *Craddock* elements as a prerequisite to the granting of a new trial." [App. B at 23].

On Ramos' motion for rehearing, however, the court of appeals withdrew its original judgment and opinion and issued a substitute opinion that completely fails to mention the federal constitutional issue on which the original opinion was based. [App. A at 1 et seq.]. Despite confirming its earlier finding that Balogh and Kenova did not receive notice of the trial, the court of appeals affirmed the trial court's denial of a new trial because it also found that Balogh and Kenova had not proven that their failure to attend trial was not intentional or the result of conscious indifference. *Balogh*, 798 S.W.2d at 699 [App. A at 8]. The court of appeals did not address Balogh's and Kenova's due process rights in any way, but implicitly held under state law that Balogh and Kenova had lost their rights to notice and the opportunity to be heard at trial:

> Balogh knew that a docket control conference was scheduled, and knew the day and time the conference was to occur. When the appointed time arrived, and he was not contacted by the clerk's office or by Quintana's office, rather than calling the clerk, Balogh took no action. We cannot countenance a party doing nothing to

> protect its rights and then complaining on appeal that its rights have been violated.
>
> We find that Balogh did not meet the requirements under *Lopez* to show his failure to attend trial was not intentional or the result of his conscious indifference, but was due to an accident or mistake. *Lopez*, 757 S.W.2d at 723.[1] Inasmuch as Balogh failed to satisfy the first prong of the *Craddock* test, we conclude the trial court did not abuse its discretion in overruling the motion for new trial.

Id.

Balogh and Kenova timely filed a Motion for Further Rehearing, which the court of appeals denied. [App. C at 28]. Balogh and Kenova timely filed a Petition for Review in the Texas Supreme Court, in which they again raised the issue of due process under the United States Constitution. The Texas Supreme Court denied the Petition for Review without an opinion [App. D at 29], and overruled the Petitioners' Motion for Reconsideration. [App. E at 30].

Balogh and Kenova now petition this Court for a writ of certiorari.

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[1] The Texas Supreme Court held in *Lopez* that a defendant who did not receive notice of trial was not required to show a meritorious defense in order to obtain a new trial after a post-answer default judgment. Unlike the present case, however, the *Lopez* court first found that the defendant's failure to appear at trial was not the result of conscious indifference. *Id.* at 723.

ARGUMENT

A. Petitioners Had a Right to Due Process, Including Notice of Trial and an Opportunity to Be Heard on the Merits Before Judgment Was Granted

The Fourteenth Amendment to the United States Constitution provides that a state may not "deprive any person of life, liberty, or property, without due process of law." U.S. CONST., amend. XIV, § 1. The fundamental elements of due process are the right to be heard and the right to receive notice of the proceeding. *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 85-87, 108 S.Ct. 896, 899-900 (1988); *Armstrong v. Manzo*, 380 U.S. 545, 550, 85 S.Ct. 1187, 1190 (1965). Rendition of a final judgment without notice to the defendant is a denial of due process. *Peralta*, 485 U.S. at 85-87, 108 S.Ct. at 899-900; *Armstrong*, 380 U.S. at 550, 85 S.Ct. at 1190.

> The constitutional right to be heard is a basic aspect of the duty of the government to follow a fair process of decisionmaking when it acts to deprive a person of his possessions.

Fuentes v. Shevin, 407 U.S. 67, 80, 92 S.Ct. 1983, 1994 (1972).

This Court has already held unconstitutional the Texas courts' imposition of state procedural conditions on a defendant's right to a new trial after entry of judgment without proper notice. *See Peralta*, 485 U.S. at 86-87, 108 S.Ct. at 900. In *Peralta*, the Texas courts refused to set aside a final judgment rendered without notice to the defendant because the defendant had not shown a meritorious defense to the action (the second prong of the

"*Craddock*" test). This Court found the judgment "constitutionally infirm," and held that the defendant was entitled to a new trial without satisfying the state law requirement of showing a meritorious defense. *Id.*

As in *Peralta*, the issue in this case is whether the Texas courts violated the constitution by imposing state law conditions on the defendant's right to an order vacating a final judgment granted without proper notice. The principal distinction between this case and *Peralta* is the specific condition imposed by the Texas court as an obstacle to due process. In *Peralta*, the Texas courts refused to set aside the illicit judgment because the defendant did not show a meritorious defense; in the present case, the judgment was allowed to stand because Balogh and Kenova, who proved that they received no notice of the trial, failed to show also that their failure to attend trial was not intentional or the result of conscious indifference.[2]

---

[2] It is difficult to conceive how the court of appeals, after acknowledging that Petitioners received no actual or constructive notice of the trial, could find that they failed to prove their absence at trial was neither intentional nor the result of conscious indifference. *Cf. Mosser v. Plano Three Venture*, 893 S.W.2d 8, 12-13 (Tex. App. – Dallas 1994, no writ) ("We do not believe that a party who, through no fault of its own, does not receive notice of a hearing can . . . be accused of intentional failure to appear or conscious indifference."). Nevertheless, that is the finding of the state court; so Petitioners, for the purpose of argument, assume that such a paradox is possible.

B. Petitioners' Presumed Failure to Inquire to the Trial Court after They Were Not Called to Participate in the Court's Conference Call Was Not a Voluntary, Knowing, and Intentional Waiver, and Did Not Result in a Forfeiture of Their Right to Receive Notice of Trial

A defendant does not lose or forfeit his due process right to prejudgment notice and hearing unless he voluntarily, intentionally and knowingly waives those rights. *See D.H. Overmyer Co., Inc. of Ohio v. Frick Co.*, 405 U.S. 174, 187, 92 S.Ct. 775, 783 (1972) (civil defendant voluntarily, intelligently, and knowingly waived right to notice and hearing, which it "otherwise possessed"). "The question of an effective waiver of a federal constitutional right in a proceeding is of course governed by federal standards." *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S.Ct. 1709, 1712 (1969).

Federal law does not presume acquiescence in the loss of fundamental rights. *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio*, 301 U.S. 292, 307, 57 S.Ct. 724, 731 (1937); *D.H. Overmyer*, 405 U.S. at 186, 92 S.Ct. at 782. To the contrary, the courts indulge every presumption *against* finding a waiver of fundamental rights. *Fuentes*, 407 U.S. at 95, 92 S.Ct. at 2001; *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023 (1938); *Bueno v. City of Donna*, 714 F.2d 484, 492-93 (5th Cir. 1983). Shifting the burdens by presuming a waiver of notice unless the complaining party shows that he requested notice would "eviscerate the protections afforded by the Constitution." *See Davis Oil Co. v. Mills*, 873 F.2d 774, 787 n. 21 (5th Cir. 1989) (invalidating a statutory presumption that property owners who failed to request notice of litigation affecting

their rights had waived due process rights), *cert. denied*, 493 U.S. 937, 110 S.Ct. 331 (1989).

To waive fundamental rights through a course of conduct, a party must have a "clear comprehension" of the consequences of the conduct. *See Bueno*, 714 F.2d at 492-93. A party cannot inadvertently waive a fundamental right, but must have advance warning that his conduct could result in a loss of the fundamental right. *See Illinois v. Allen*, 397 U.S. 337, 343, 90 S.Ct. 1057, 1060-61 (1970) (defendant can lose right to be present at trial "after he has been warned by the judge" that he will be removed if he continues disruptive behavior); *Ohio Bell*, 301 U.S. at 307, 57 S.Ct. at 731 (defendant did not consent to state agency's making factual determinations without reference to evidence when defendant had no warning that such a procedure was possible).

The state court, far from finding that Balogh and Kenova intentionally and knowingly waived their rights, ultimately held that Balogh and Kenova lost their constitutional right to notice of trial merely because they failed to contact the court after no one called to include them in the docket control conference. *Balogh*, 798 S.W.2d at 699 [App. A at 7-8]. However, Balogh and Kenova were not aware that a trial without further notice was a possible penalty for not calling the court to inquire about the results of the docket control conference. The court's notice of the docket control conference states that the possible consequences of failing to participate were that the court could (a) dismiss the case for want of prosecution, (b) reschedule the matter for an additional hearing, or (c) set the case for trial at the convenience of counsel present. [App. I at 38]. Nothing in the notice of the docket

control conference remotely suggests that the case could be set for trial and then tried without further notice to absent parties.

Moreover, the court's notice of the conference provided that "Mr. Carlos Quintana will initiate call *if one is necessary.*" [App. I at 38] (emphasis supplied). This language suggests, especially to a pro se defendant, that the docket control conference might not be necessary, and that Quintana might not initiate the call if it were not necessary. Indulging all presumptions against waiver, Balogh and Kenova reasonably could have concluded that the docket control conference simply was not necessary and had not been held.

Even if they had intentionally refused to appear for the docket control conference, Petitioners' absence from the hearing could not be construed as a waiver of the right to notice of trial, because there was no notice or warning that the conference call was the only opportunity for them to receive notice of the trial date, or that trial could be set and judgment rendered against them without further notice if they did not participate in the telephone conference.

C. The State Court's Finding That Petitioners Forfeited Their Right to Notice Violates the Federal Standard for a Waiver of Fundamental Rights

The state court's decision defies the constitution and the federal standard for a forfeiture of due process rights in three ways. First, by finding that Balogh and Kenova forfeited their right to notice of the trial without requiring proof that Balogh and Kenova waived their federal

rights, the Texas court applied a standard that is incompatible with federal law.

The state court did not find that Balogh and Kenova waived their constitutional rights to notice of the trial and an opportunity to be heard before rendition of judgment.[3] Instead, the state court found that Balogh and Kenova lost their right to due process because they failed to satisfy the first prong of the *Craddock* test by showing that their failure to appear for trial was neither intentional nor the result of conscious indifference. *Balogh*, 798 S.W.2d at 699.

Second, instead of indulging all presumptions against a waiver of fundamental rights, the Texas court, by placing the burden on Balogh and Kenova to prove that their failure to attend trial was not intentional or the result of conscious indifference, presumed that Balogh and Kenova had forfeited their right to notice. The state court was constitutionally required to place the burden of proof on the party claiming a waiver of fundamental rights, and not on the party who was deprived of them. *See Miranda v. Arizona*, 384 U.S. 436, 475, 86 S.Ct. 1602, 1628 (1966).

The state court's misapplication of the presumptions and burden of proof was decisive in this case. There is no evidence in the record to support the state court's conclusion that Balogh and Kenova, "rather than calling the

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[3] The absence of a waiver finding is understandable, since the record does not support such a finding, and also because Ramos never contended in state court that Balogh and Kenova waived their federal constitutional rights.

clerk . . . took no action". *See Balogh,* 798 S.W.2d at 699 [App. A at 8]. Consequently, the state court's holding that Balogh and Kenova forfeited their right to notice of trial is improperly based upon a presumption from a silent record. "Presuming waiver [of constitutional rights] from a silent record is impermissible." *Carnley v. Cochran,* 369 U.S. 506, 516, 82 S.Ct. 884, 890 (1962).

The state court placed the burden upon Balogh and Kenova to prove that their "failure to attend trial was . . . due to [their] failure to receive actual or constructive notice of the trial setting." *Balogh,* 798 S.W.2d at 699. When Balogh and Kenova did not meet that burden in the state court's eyes, the state court concluded that Balogh and Kenova would not have appeared for trial even if they had received notice. However, as this Court has noted, the right to be heard "has little reality or worth unless one is informed that the matter is pending and *can choose for himself* whether to appear or default, acquiesce or consent." *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314, 70 S.Ct. 652, 657 (1950) (emphasis added).

Finally, and perhaps most important, the state court blatantly disregarded the supremacy of the federal constitution by utterly failing to address the due process claims that formed the basis of the original opinion; by failing to analyze whether Balogh and Kenova had waived their federal rights; and by failing to analyze whether applying the first prong of the *Craddock* test to deny a new trial was inconsistent with the federal guarantee of due process. The Texas courts were obligated to enforce Balogh's and Kenova's federal constitutional rights to notice and hearing without imposing inconsistent conditions required by state law.

> A state court may not deny a federal right, when the parties and controversy are properly before it, in the absence of "valid excuse" . . . An excuse that is inconsistent with or violates federal law is not a valid excuse: The Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source.

Howlett By and Through Howlett v. Rose, 496 U.S. 356, 369, 110 S.Ct. 2430, 2439-40 (1990).

In the present case, the only excuse for the Texas courts' denial of Balogh's and Kenova's right to notice and hearing was their alleged failure to satisfy the first prong of the *Craddock* test, which, as shown above, is inconsistent with the constitution and the federal legal standard for waiver of a fundamental right.

The court of appeals imposed an extreme penalty on the Petitioners for perceived inattention to their right to participate in the docket control conference – the loss of their constitutional rights. Conversely, the court imposed no adverse consequences upon Ramos, who knowingly misrepresented to the court that telephone numbers were not available for Balogh and Kenova, thereby excluding them from the conference call during which the trial date was set.

Indeed, the facts of this case strongly suggest concerted action by Ramos to obtain a default judgment by concealing the trial date from Balogh and Kenova. First, Ramos persuaded the court to conduct the docket control

conference and set a trial date *ex parte* by falsely representing that no telephone number was available for Petitioners. Then, the court set the case for trial in a written docket control order, which happens to be the only court document in the court's file with no indication that a copy was sent to Petitioners. As the trial date approached, Ramos served discovery that required Petitioners to provide responses *one week after the date of trial*, further concealing the trial date from Petitioners, who had no reason to suspect that the trial would be held before their responses were due. Ramos then failed to contact Balogh and Kenova to arrange for mediation, in complete disregard for the trial court's order for pretrial mediation.

Instead of penalizing Ramos for his deception (or at least imposing some adverse consequences), the Texas courts rewarded his cleverness by granting and then affirming a judgment in excess of $125,000.00 on a claim for a dishonored $5,000.00 check.

D. The Constitutional Right to Due Process Supersedes State Law Conditions for Setting Aside a Judgment That Was Granted Without Proper Notice

The United States Constitution is "the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding." U.S. CONST., art. VI, cl. 2. State law, therefore, is pre-empted to the extent that it "stands as an obstacle" to Balogh's and Kenova's federal constitutional rights. *See English v. General Electric Co.*, 496 U.S. 72, 80, 110 S.Ct. 2270, 2275 (1990). In addition, state

law may not impose procedural requirements that place an impermissible burden on the vindication of federal rights. *See Fay v. Noia*, 372 U.S. 391, 432, 83 S.Ct. 822, 845 (1963); *see also Howlett*, 496 U.S. at 369, 110 S.Ct. at 2439-40.

> Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.

Davis v. Wechsler, 263 U.S. 22, 24, 44 S.Ct. 13, 14 (1923) (Holmes, J.).

Accordingly, this Court should invalidate the state court judgment, and hold that no element of the Texas Supreme Court's *Craddock* test may be injected as an obstacle to a defendant's right to a new trial when judgment has been rendered against him without proper notice. *See Martin v. Hunter's Lessee*, 14 U.S. 304, 344 (1816) (courts of the United States have power to invalidate state court judgments that are contrary to the Constitution).

CONCLUSION

The Texas court in this case has committed the very error that compelled this Court's ruling in *Peralta*. In both cases the Texas state courts held that the defendants' rights had not been violated because the result at trial would have been the same if the defendants had received notice. In *Peralta*, the state court concluded the result would have been the same because the defendant did not

show a meritorious defense. *See Peralta*, 485 U.S. at 86, 108 S.Ct. at 900. In the present case, the state court concluded the result would have been the same because the court assumed that Balogh and Kenova probably would not have appeared for trial even if they had received notice.

As the Court noted in *Armstrong v. Manzo*, only the granting of a new trial "would have wiped the slate clean," and restored each Petitioner "to the position he would have occupied had due process of law been accorded to him in the first place." 380 U.S. at 550, 85 S.Ct. at 1190. Petitioners respectfully ask the Court to grant this petition for writ of certiorari and, after considering the briefs and arguments of the parties, reverse the judgment of the Texas court and remand the case for a trial on the merits.

Respectfully submitted,

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Steven Balogh and
Kenova Construction Corporation

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APPENDIX A

COURT OF APPEALS

Thirteenth Judicial District

Corpus Christi, Texas

Below is the JUDGMENT in the numbered cause set out herein to be Filed and Entered in the Minutes of the Court of Appeals, Thirteenth Judicial District of Texas, at Corpus Christi, as of the *1st day of October, 1998*. If this Judgment does not conform to the opinion handed down by the Court in this cause, any party may file a motion for Correction of Judgment with the Clerk of this court.

CAUSE NO. 13-97-461-CV (Tr. Ct. No. C-2109-96-B)

STEVEN BALOGH AND KENOVA CONSTRUCTION COMPANY, Appellants,

v.

RICHARD RAMOS, Appellee,

On appeal to this Court from Hidalgo County, Texas.

* * * * * * * * *

JUDGMENT

The Court's judgment dated May 1, 1998, is hereby withdrawn, and the following judgment is substituted therefor.

On appeal from the 93rd District Court of Hidalgo County, Texas, from a judgment signed April 28, 1997. Opinion by Justice Nelda Rodriguez. Publish, Tex. R. App. P. 47.3.

THIS CAUSE was submitted to the Court on April 15, 1998, on oral argument, the record, and briefs and is now

before the Court on appellee's motion for rehearing. These having been examined and fully considered, it is the opinion of the Court that there was some error in the judgment of the court below, and said judgment is hereby REFORMED, AND AS REFORMED AND MODIFIED, AFFIRMED.

Costs of the appeal are adjudged one-quarter against appellee, Richard Ramos, and three-quarters against appellants, Steven Balogh and Kenova Construction Corporation. It is further ordered that this decision be certified below for observance.

* * * * * * * * *

CATHY WILBORN, CLERK

[SEAL]

NUMBER 13-97-461-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI

STEVEN BALOGH AND KENOVA CONSTRUCTION CORPORATION, Appellants,

v.

RICHARD RAMOS, Appellee.

On appeal from the 93rd District Court
of Hidalgo County, Texas.

OPINION ON MOTION FOR REHEARING

Before Chief Justice Seerden and
Justice Yañez and Rodriguez
Opinion by Justice Rodriguez

We grant appellee's motion for rehearing, withdraw our opinion dated May 21, 1998 and substitute this opinion in its place.

This is an appeal from a post-answer default judgment rendered against appellants Steven Balogh and his company, Kenova Construction Corporation.[1] Balogh claims he did not have notice of the trial setting and thus the trial court erred in denying his "Motion to Vacate

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[1] Balogh and Kenova will be collectively referred to as "Balogh."

Default Judgment and for New Trial." He additionally raises issues concerning (1) the legal and factual sufficiency of the evidence; (2) whether the plaintiff is entitled to a mixed recovery for tort and contract for the same transaction; (3) whether the plaintiff is entitled to contract damages for his alleged consequential damages; (4) whether the consequential and exemplary damages awarded are manifestly too large; and (5) whether the court erred in rendering judgment in favor of an entity not a party to the suit. We reform and modify the judgment and, as reformed and modified, affirm.

FACTS

Steven Balogh, a resident of Florida, hired James Rausch to recover funds represented by two checks after the checks were dishonored by the bank of Kenova's Mexican customer. The Mexican attorney engaged by Rausch to assist him in collecting the funds, Heron Gomez, required the original checks in order to proceed. Balogh apparently became dissatisfied with Gomez's handling of the matter and instructed Rausch to fire him, which Rausch did. As Gomez had expended time and effort on Balogh's behalf, he demanded compensation in the amount of $25,000 before he would release the original checks to Rausch.

Rausch contacted appellee Ricardo Ramos, an attorney in McAllen, to assist him in negotiations to retrieve the original checks. After Ramos became involved, Gomez agreed to release the checks upon payment of $5,000. Balogh was pressing Ramos for a quick resolution of the matter and requested that Ramos pay the $5,000

himself. Balogh repeatedly assured Ramos that he would reimburse Ramos for the $5,000 and he gave Ramos an authorization on behalf of Kenova to expend the $5,000.

Ramos withdrew $5,000 from his operating account and engaged an intermediary who exchanged the $5,000 for the original checks. After Balogh arrived from Florida, he obtained the original checks from Ramos and gave Ramos a check in the amount of $5,000, drawn on Kenova's shop account. The $5,000 check was subsequently returned to Ramos by his bank, with the notation, "Payment Stopped." Balogh refused any further contact with Ramos.

Ramos brought suit against Balogh and Kenova in a Hidalgo County district court. After much difficulty, Balogh was eventually served in Florida and entered an answer *pro se*. At Ramos's request, the trial court set a telephonic docket control conference. Balogh did not attend the conference, at which time a trial date was set. Balogh did not appear at trial. The trial court heard evidence and entered a post-answer default judgment against Balogh and Kenova. Thereafter, it denied Balogh's motion for new trial.

ANALYSIS

Balogh's first issue addresses the trial court's denial of his motion for new trial. The trial court's decision to overrule such a motion is subject to review for abuse of discretion. *Cliff v. Huggins*, 724 S.W.2d 778, 778 (Tex. 1987); *Strackbein v. Prewitt*, 671 S.W.2d 37, 38 (Tex. 1984). We therefore review the record to determine if, based on the facts before it, the trial court abused its discretion in

overruling Balogh's motion. For the reasons set out below, we conclude it did not.

In making our determination, we are guided by the well-known, three-part test set out in *Craddock v. Sunshine Bus Lines, Inc.*, 134 Tex. 388, 133 S.W.2d 124, 126 (1939):

> (1) the failure of the defendant to answer before judgment was not intentional, or the result of conscious indifference on his part, but was due to a mistake or an accident, (2) provided the motion for a new trial sets up a meritorious defense, and (3) is filed at a time when the granting thereof will occasion no delay or otherwise work an injury to the plaintiff.

The prerequisites for setting aside a no-answer default judgment have been applied to post-answer default judgments such as the present case. *Director, State Employees Workers' Compensation Div. v. Evans*, 889 S.W.2d 266, 268 (Tex. 1994). If the defendant proves the *Craddock* elements, it is an abuse of discretion if the trial court fails to grant a new trial. *Old Republic Ins. Co. v. Scott*, 873 S.W.2d 381, 382 (Tex. 1994); *Bank One Texas, N.A. v. Moody*, 830 S.W.2d 81, 85 (Tex.1992).

Balogh contends he did not receive notice of the trial setting. To prevail on this point of error, Balogh was required to show his failure to attend trial was not intentional or the result of conscious indifference, but was due to his failure to receive actual or constructive notice of the trial setting. *See Lopez v. Lopez*, 757 S.W.2d 721, 723 (Tex. 1988).

Balogh's motion was accompanied by his affidavit which set out the following: (1) prior to the date of trial,

Balogh never received a copy of the court's docket control order dated January 7, 1997, indicating that trial was set for 9:00 a.m. on March 17, 1997; (2) Balogh reviewed the Ramos litigation file kept by Kenova Construction, and no copy of the docket control order was in said file; (3) Balogh made inquiry of Kenova Construction employees, all of whom denied having knowledge of receiving the docket control order; and (4) even if Balogh *had* received a copy of the docket control order, the order misstyled the case as "*Ricardo Flores v. Steven Balogh*" and Balogh had never dealt with "Ricardo Flores".

We conclude Balogh's affidavit sufficiently sets out that he did not receive the docket control order and thus had no actual notice of the March 17, 1997 trial setting. What this evidence does not address, however, is whether his failure to answer before judgment was intentional or due to conscious indifference. Balogh never states he did not receive notice of Ramos's request for a docket control conference. Indeed, any such claim would lack credibility in light of the trial clerk's notation at the bottom of the notice that it was mailed to Balogh, and the clerk's affidavit testimony that she mailed the notice to Balogh. On the actual docket control order, the clerk noted on the bottom of the page that "No phone number [was] available for Mr. Balogh per Elizabeth. Although Notice for Docket Control Conference was sent to Mr. Balogh." The notice for the docket control conference provided:

> As requested by Carlos Quintana, the above numbered and styled cause has been set on the 7th day of January, 1997 at 3:00 pm for the following:

> DOCKET CONTROL CONFERENCE, Mr. Carlos Quintana will initiate the call if one is necessary.

Balogh knew that a docket control conference was scheduled, and knew the day and time the conference was to occur. When the appointed time arrived, and he was not contacted by the clerk's office or by Quintana's office, rather than calling the clerk, Balogh took no action. We cannot countenance a party doing nothing to protect its rights and then complaining on appeal that its rights have been violated. *See generally, Brown v. University of Tex. Health Science Ctr. at Tyler*, 957 S.W.2d 911, 916 (Tex. App. – Tyler 1997, no writ) (when notified of a hearing, party's opportunity to be heard is lost by his own inaction in failing to attend).

We find that Balogh did not meet the requirements under *Lopez* to show his failure to attend trial was not intentional or the result of his conscious indifference, but was due to an accident or mistake. *Lopez*, 757 S.W.2d at 723. Inasmuch as Balogh failed to satisfy the first prong of the *Craddock* test, we conclude the trial court did not abuse its discretion in overruling the motion for new trial. Balogh's first point of error is overruled.

In issue number seven, Balogh cites to *Cunningham v. Parkdale Bank*, 660 S.W.2d 810, 813 (Tex. 1983), and asserts that, in the absence of any pleadings specifically requesting the relief, the trial court erred in entering a judgment which contained a finding that "neither James E. Rausch nor [Ramos] were negligent." Balogh failed to preserve this assertion because, unlike the appellant in *Cunningham*, Balogh did not raise the issue in his motion for new trial, nor present his complaint to the trial court. The

rules of appellate procedure provide that as a requisite to presenting a complaint for appellate review, the record must show that "the complaint was made to the trial court by a timely request, objection, or motion that stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint." TEX. R. APP. P. 33.1(1)(A); *Hirczy v. Hirczy*, 838 S.W.2d 783, 785 (Tex. App. – Corpus Christi 1992, writ denied). Having failed to preserve the alleged error for our review, issue number seven is overruled.

Asserting deficiencies in Balogh's motion for new trial, Ramos urges this Court to find Balogh failed to preserve his complaints regarding issues two through six. We have reviewed Balogh's motion for new trial, and while he did perfunctorily list eighteen points of error, preceding the list, Balogh set out the arguments and authorities that give rise to the asserted points of error. Accordingly, we find this argument without merit.

Ramos also contends Balogh failed to preserve error with respect to issues two, five, and six, which contest the sufficiency of the evidence to support the trial court's finding of fraud and awards of both consequential and punitive damages. The judgment at issue does not distinguish between the various elements of Ramos's damages, but instead provides for a global award, which encompassed Ramos's claimed damages for the dishonored check, consequential damages, punitive damages, and attorney's fees. Citing to our decision in *Greater Houston Transp. Co. v. Zrubeck*, 850 S.W.2d 579, 589 (Tex. App. – Corpus Christi 1993, writ denied), and to *Amelia's Automotive, Inc. v. Rodriguez*, 921 S.W.2d 767, 771 (Tex. App. –

San Antonio 1996, no writ), Ramos claims that because Balogh did not address each and every damage element and show that not a single element was supported by sufficient evidence, Balogh waived his complaints regarding the sufficiency of the evidence. We disagree.

Both *Greater Houston* and *Amelia's Automotive* were cases tried to the jury upon submission of a broad form question. Thus, on appeal, the reviewing court could not "ascertain with certainty what amount of the damages award is attributable to each element." *Greater Houston*, 850 S.W.2d at 589. In the present non-jury case, we have the reporter's record from trial. After the close of Ramos's evidence and closing argument, the trial court stated:

> Okay. I'll grant the request for the $5,000, plus interest, which is the amount of the check paid by Mr. Ramos on behalf of Balogh. Also, award the $30,000 in consequential damages for Mr. Ricardo Ramos. I'm also going to assess $100,000 as exemplary damages against the Defendant Balogh and Kenova Construction.
>
> I'll also grant the request for the $8,550 in attorney's fees for the trial of this case. Also grant $15,000 attorney's fees for the appeal of this case. And, also, an additional $5,000 as attorney's fees if there is an application for writ of error. I'll also grant the $10,000 request on attorney's fees for the actions to be filed in Florida State court. And, also, grant the request for the $15,000 in attorney's fees for the appellate process – for attorney's fees for the appellate process in Florida.

Ramos contends this language amounts to mere comments from the bench to which we cannot attach any significance. *See Sharp v. Hobart*, 957 S.W.2d 650 652 n.5 (Tex. App. – Austin 1997, no writ) (oral comments do not constitute findings of fact and conclusions of law). Again, we disagree. Judgment is rendered when the trial court officially announces its decision in open court or by written memorandum filed with the clerk. *Samples Exterminators v. Samples*, 640 S.W.2d 873, 875 (Tex. 1982); *Comet Aluminum Co. v. Dibrell*, 450 S.W.2d 56, 59 (Tex. 1970). As the supreme court explained in *Reese v. Piperi*:

> The judge's intention to render judgment in the future cannot be a present rendition of judgment. The rendition of judgment is a present act, either by spoken word or signed memorandum, which decides the issues upon which the ruling is made. The opportunities for error and confusion may be minimized if judgments will be rendered only in writing and signed by the trial judge after careful examination. Oral rendition is proper under the present rules, but orderly administration requires that form of rendition to be in and by spoken words, not in mere cognition, and to have effect only insofar as those words state the pronouncement to be a present rendition of judgment.

534 S.W.2d 329, 330 (Tex. 1976) (orig. proceeding). Thus, the words used by the trial court must clearly indicate the intent to render judgment at the time the words are expressed. *S & A Restaurant Corp. v. Leal*, 892 S.W.2d 855, 858 (Tex. 1995). The application of these principles leads us to conclude the trial court in this case rendered judgment immediately after trial and his statements were not merely comments or a substitution for findings of fact

and conclusions of law. We thus have before us the amounts attributable to Ramos's various elements of damage, and proceed to a determination of the sufficiency of the evidence to support the damages awarded.

In issue number two, Balogh contends there is no evidence to support Ramos's claim of fraud or the award of punitive damages.[2] In reviewing a no evidence point, we must consider only the evidence and reasonable inferences therefrom which tend to support the jury findings, disregarding all contrary evidence and inferences. *Responsive Terminal Sys., Inc. v. Boy Scouts of Am.*, 774 S.W.2d 666, 668 (Tex. 1989). We sustain a legal sufficiency challenge when the record discloses (1) there is a complete absence of evidence of a vital fact, (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (3) the evidence offered to prove a vital fact is no more than a

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[2] We find Balogh's complaint regarding punitive damages has not been sufficiently briefed. While he claims the evidence is insufficient, he does not provide any argument or authorities to support that claim. TEX. R. APP. P. 38.1(h). He merely states "Exemplary damages cannot be admitted by default. *Sunrizon Homes v. Fuller*, 747 S.W.2d 530, 534 (Tex. App. – San Antonio 1988, writ denied)." *Sunrizon Homes* stands for the proposition that in a default situation, where the damages are unliquidated, the trial court must receive testimony to support the imposition of such damages. Balogh's citation to *Sunrizon* does not support his argument regarding the sufficiency of the evidence to support the award of punitive damages. As the court here heard testimony on the issue of exemplary damages in this case, it complied with *Sunrizon*. Because Balogh has not presented us with any other basis upon which to conduct a review of the sufficiency of testimony relating to punitive damages, we decline to do so.

mere scintilla, or (4) the evidence conclusively establishes the opposite of the vital fact. *Cecil v. Smith*, 804 S.W.2d 509, 510 n.2 (Tex. 1991).

The supreme court has defined fraudulent inducement as a simple fraud claim. *See DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 688 (Tex. 1990). The elements of fraud and fraudulent inducement, applicable here, are (1) a material misrepresentation, (2) which was false, and (3) which was either known to be false when made or was asserted without knowledge of the truth, (4) which was intended to be acted upon, (5) which was relied upon, and (6) which caused injury. *Id.*

Ramos testified that when he informed Balogh that Gomez demanded he be paid $5,000 before he would release the dishonored checks, Balogh stated, " 'Well, look, I assure you that if you will just do that, I will pay you. I will take care of you. Please do that. You don't understand, they're going to pay me $800,000. Five thousand dollars is nothing.' " Ramos's testimony continued:

> I said, "Look, I don't know anything about this. I just know that that's the situation." I said, "Who do the checks belong to?" He said, "The checks belong to Kenova." I said, "Well, at the minimum, what I'm going to need is authorization from Kenova, but I'm relying on you." He said, "Don't worry about it. You go ahead and do it." He sent me a fax, dated March the 15th, and authorized me to pay the $5,000 and noticed the two checks on there.

Ramos testified further about the representation and his reliance on Balogh's promise to pay:

Q: Now, Mr. Ramos, on a day-to-day basis, do you have this kind of money just sitting around?

A: No, no. This is money that's used to pay overhead. This is money that's necessary for cash flow for the office. That is the kind of money that I assume that I was going out on a limb to do, because this is not what I normally do, and I was doing it because of his direct representations to me that he would be over by Monday, at the latest, just a few days, to take care of the matter.

Concerning Balogh's knowledge of the misrepresentation, Ramos testified that he believed Balogh made the misrepresentations concerning payment "premeditatedly": "He (Balogh) set up a trap, premeditatively [sic]. He came down, reassured me a hundred times – that's an exaggeration, but many times, not to be concerned, he would take care of it. So I feel that he and Kenova, both, premeditatively [sic] made representations I was to rely on, which I did, to my detriment."

The trial court also had before it the written authorization Balogh sent to Ramos on behalf of Kenova, the dishonored check, and a copy of a letter from Texas Commerce Bank to Ramos, stating the check had been returned with the notation "payment stopped."

We find the foregoing evidence more than sufficient to sustain the trial court's finding of fraud. Balogh's second issue is overruled.

By issue number three, Balogh complains the judgment in this case erroneously gives Ramos a double

recovery by awarding damages for both breach of contract and fraud. In the recent case of *Formosa Plastics Corp. USA v. Presidio Eng'rs and Contractors, Inc.*, 960 S.W.2d 41 (Tex. 1998), the supreme court held that

> tort damages are recoverable for a fraudulent inducement claim irrespective of whether the fraudulent representations are later subsumed in a contract or whether the plaintiff only suffers an economic loss related to the subject matter of the contract. Allowing the recovery of fraud damages sounding in tort only when a plaintiff suffers an injury that is distinct from the economic losses recoverable under a breach of contract claim is inconsistent with this well-established law, and also ignores the fact that an independent legal duty, separate from the existence of the contract itself, precludes the use of fraud to induce a binding agreement. We therefore disapprove of the following appellate court opinions to the extent that they hold that tort damages cannot be recovered for a fraudulent inducement claim absent an injury that is distinct from any permissible contractual damages. . . . We instead conclude that, if a plaintiff presents legally sufficient evidence on each of the elements of a fraudulent inducement claim, any damages suffered as a result of the fraud sound in tort.

Id. at 47 [citations omitted]; *see also American Nat'l Petroleum Co. v. Transcontinental Gas Pipe Line Corp.*, 798 S.W.2d 274, 278 (Tex. 1990) (tort damages not precluded for a tortious interference with contract claim, notwithstanding fact that the damages for the tort claim compensated for the same economic losses that were recoverable under a

breach of contract claim). Balogh's issue number three is overruled.

In issue number six, Balogh asserts the evidence is legally and factually insufficient to support the trial court's award of $30,000 in consequential damages.

We have previously set out the standard of review used to resolve a legal sufficiency challenge. When reviewing for factual sufficiency, a reviewing court looks at all the evidence and determines whether the finding was so against the great weight and preponderance of the evidence as to be manifestly unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986).

Ramos testified he suffered the following damages: (1) $4,500 for the time "lost from my office"; (2) $500 for extra time that his paralegal spent in reconciling his bank statement; and (3) $25,000 for financial embarrassment or mental distress. Concerning the $4,500 and $500 "time lost" portion of the consequential damages, Balogh states "the evidence of distractions at Ramos'[s] office will not support a recovery for ***contractual*** consequential damages." (Emphasis added)

As noted above, the supreme court dispensed with this argument in *Formosa Plastics Corp. USA*, 960 S.W.2d at 46. We previously found the evidence sufficient to sustain the trial court's finding of fraudulent inducement. Thus, any damages emanating from that fraud sound in tort, not contract. Balogh's contention is overruled.

With respect to the $25,000 for financial embarrassment or mental anguish, the supreme court established the evidentiary requirements for recovery of mental

anguish damages in *Parkway Co. v. Woodruff*, 901 S.W.2d 434 (Tex. 1995): the evidence must show the nature, duration, and severity of mental anguish, thus establishing a substantial disruption in the plaintiff's daily routine. *Id.* at 444. Ramos's testimony regarding his mental anguish is set out below:

> The financial embarrassment through all this thing and having to put up with this, I really feel that this – besides the loss of time and paralegal time, the financial embarrassment on this thing, and the fact that I was, quote, unquote, "fooled," has its own factors. There are times of uneven flow in your office, in terms of income, and when things are low, to take a $5,000 loss, put worry and concern on you. You can wake up in the middle of the night saying, "Now, what am I going to do?" I've got to go impose upon friends, to hire their services. I've got to impose upon other people to help me with all this. I think I've been damaged in terms of mental distress, financial embarrassment to the tune of $25,000.

There was no testimony from Ramos on the duration or severity of his mental anguish. The cited testimony shows Ramos suffered no more than "mere worry, anxiety, vexation, embarrassment, or anger," which does not rise to a compensable level of emotional distress. *Parkway Co.*, 901 S.W.2d at 445. Balogh's issue number six is sustained. Due to our disposition of issue number six, we need not address issues four and five. TEX. R. APP. P. 47.1.

The courts of appeals are empowered to affirm, modify, correct, reform, reverse and remand, reverse and render the judgment that the court below should have

rendered, or dismiss. TEX. R. APP. P. 43.2. Accordingly, we REFORM the judgment to read " . . . that Plaintiff Ricardo A. Ramos, recover from Defendants jointly the sum of $108,750 plus pre-judgment interest at the rate of 10% from April 22, 1996, plus all costs of court."[3] As reformed and modified, the judgment is AFFIRMED.

NELDA V. RODRIGUEZ
Justice

Publish.
Tex. R. App. P. 47.3.

Opinion delivered and filed
this the 1st day of October, 1998.

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[3] We note the original judgment awarded Ramos the sum of $133,750, which is $9,800 less than the amount awarded when the court orally rendered its decision from the bench.

APPENDIX B

COURT OF APPEALS
Thirteenth Judicial District
Corpus Christi, Texas

Below is the JUDGMENT in the numbered cause set out herein to be Filed and Entered in the Minutes of the Court of Appeals, Thirteenth Judicial District of Texas, at Corpus Christi, as of the 21st day of May, 1998. If this Judgment does not conform to the opinion handed down by the Court in this cause, any party may file a motion for Correction of Judgment with the Clerk of this Court.

CAUSE NO. 13-97-461-CV (Tr. Ct. No. C-2109-96-B)

STEVEN BALOGH AND KENOVA CONSTRUCTION COMPANY,

Appellants,

v.

RICHARD RAMOS,

Appellee,

on appeal to this Court from Hidalgo County, Texas.

JUDGMENT

On appeal from the 93rd District Court of Hidalgo County, Texas, from a judgment signed April 28, 1997. Opinion by Justice Nelda Rodriguez. Publish. Tex. R. App. P. 47.3.

THIS CAUSE was submitted to the Court on April 15, 1998, on oral argument, the record, and briefs. These having been examined and fully considered, it is the opinion of the Court that there was some error in the

judgment of the court below, and said judgment is hereby REVERSED AND REMANDED.

Costs of the appeal are adjudged against appellee, Richard Ramos. It is further ordered that this decision be certified below for observance.

CATHY WILBORN, CLERK

[SEAL]

NUMBER 13-97-461-CV

COURT OF APPEALS
THIRTEENTH DISTRICT OF TEXAS
CORPUS CHRISTI

STEVEN BALOGH AND
KENOVA CONSTRUCTION CORPORATION,

Appellants,

v.

RICHARD RAMOS,

Appellee.

On appeal from the 93rd District Court
of Hidalgo County, Texas.

OPINION

Before Chief Justice Seerden and Justices Yan~ez and Rodriquez
Opinion by Justice Rodriguez

This is an appeal from a post-answer default judgment rendered against appellants Steven Balogh and his company, Kenova Construction Corporation.[1] In seven points of error, Balogh complains the trial court erred in denying his "Motion to Vacate Default Judgment and for New Trial." We reverse and remand.

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[1] Balogh and Kenova will be collectively referred to as "Balogh."

The trial court's decision to overrule a motion for new trial is subject to review for abuse of discretion. *Cliff v. Huggins*, 724 S.W.2d 778, 778 (Tex. 1987); *Strackbein v. Prewitt*, 671 S.W.2d 37, 38 (Tex. 1984). That discretion, however, is "not an unbridled discretion to decide cases as they might," *Craddock v. Sunshine Bus Lines, Inc.*, 134 Tex. 388, 133 S.W.2d 124, 126 (1939), but must be guided by a three-part test:

> (1) the failure of the defendant to answer before judgment was not intentional, or the result of conscious indifference on his part, but was due to a mistake or an accident, (2) provided the motion for a new trial sets up a meritorious defense, and (3) is filed at a time when the granting thereof will occasion no delay or otherwise work an injury to the plaintiff.

Old Republic Ins. Co. v. Scott, 873 S.W.2d 381, 382 (Tex. 1994) (citing *Craddock*, 133 S.W.2d at 126 (1939)); *Estate of Pollack v. McMurrey*, 858 S.W.2d 388, 390 (Tex. 1993). The prerequisites for setting aside a no-answer default judgment have been applied to post-answer default judgments. *Director, State Employees Workers' Compensation Div. v. Evans*, 889 S.W.2d 266, 268 (Tex. 1994). If the defendant proves the *Craddock* elements, it is an abuse of discretion if the trial court fails to grant a new trial. *Old Republic Ins. Co.*, 873 S.W.2d at 382; *Bank One Texas, N.A. v. Moody*, 830 S.W.2d 81, 85 (Tex. 1992).

In his first point of error, Balogh asserts he did not receive notice of the trial setting. Balogh further asserts that when a defendant claims he did not receive notice of the trial setting, the second and third requirements of *Craddock* do not apply. We agree. Once a defendant has

made an appearance in a cause, he is entitled to notice of the trial setting as a matter of due process. *Vining v. Vining*, 782 S.W.2d 261, 262 (Tex. App. – Houston [14th Dist.] 1989, no writ) (citing *LBL Oil Co. v. International Power Serv., Inc.*, 777 S.W.2d 390, 390-91 (Tex. 1989)). A fundamental element of due process is adequate and reasonable notice of proceedings. *Chow v. Dole*, 677 S.W.2d 220, 221 (Tex. App. – Houston [1st Dist.] 1984, no writ) (citing *Mexia Indep. Sch. Dist. v. City of Mexia*, 134 Tex. 95, 133 S.W.2d 118, 121 (1939)). The United States Supreme Court has repeatedly held that if the record establishes a defendant does not receive notice of the trial setting, it violates due process to require the *Craddock* elements as a prerequisite to the granting of a new trial. *See Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 85-87 (1988); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950); *see also Lopez v. Lopez*, 757 S.W.2d 721, 723 (Tex. 1988). We must therefore determine whether Balogh established he did not receive notice of the trial setting.

In determining the sufficiency of each party's proof on the issue of notice, we are guided by the supreme court's opinion in *Strackbein*, wherein the court held, "it is sufficient that the movant's motion and affidavits set forth facts which, if true, would negate intentional or consciously indifferent conduct." *Strackbein*, 671 S.W.2d at 38-39; *see also Cliff*, 724 S.W.2d at 779.

At the hearing on Balogh's motion to set aside default judgment, appellee Ramos introduced the affidavit of Aide Salinas, the assistant court coordinator for the 93rd Judicial District Court. Ms. Salinas stated that after the court conducted a telephonic docket control

conference, she typed the docket control order and placed the same in the mail to both counsel for Ramos and to Balogh.[2] TEX. R. CIV. P. 21a provides that, "Service by mail shall be complete upon deposit of the paper, enclosed in a postpaid, properly addressed wrapper, in a post office or official depositary under the care and custody of the United States Postal Service." Thus, rule 21a sets up a presumption that when notice of trial setting properly addressed and postage prepaid is mailed, the notice was duly received by the addressee.[3] *See Southland Life Ins. Co. v. Greenwade*, 138 Tex. 450, 159 S.W.2d 854 (Tex. Comm'n App. 1942, judgm't adopted). This presumption may be rebutted by an offer of proof of nonreceipt. Moreover, the presumption is not "evidence" and it vanishes when opposing evidence is introduced that the letter was not received. *Cliff*, 724 S.W.2d at 780; *Greenwade*, 159 S.W.2d at 857.

In the present case, the motion to vacate default judgment and for new trial was accompanied by Balogh's affidavit which set out the following: (1) prior to the date of trial, Balogh never received a copy of the court's docket control order dated January 7, 1997, indicating that trial was set for 9:00 am on March 17, 1997; (2)

---

[2] Salinas stated a copy of the order she sent to Balogh was attached to her affidavit as Exhibit A, but the affidavit in the clerk's record filed with this Court does not have the exhibit attached.

[3] We note, however, that Salinas's affidavit merely stated she mailed the order to Balogh. She did not state she deposited the order "in a postpaid, properly addressed wrapper, in a post office or official depositary under the care and custody of the United States Postal Service" or words to that effect.

Balogh reviewed the Ramos litigation file kept by Kenova Construction, and no copy of the docket control order was in said file; (3) Balogh made inquiry of Kenova Construction employees, all of whom denied having knowledge of receiving the docket control order; and (4) the docket control order is misstyled as *"Ricardo Flores v. Steven Balogh"* and Balogh never had any dealings with anyone named Ricardo Flores. We find Balogh's affidavit sufficient to rebut rule 21a's presumption of service. *See Ruiz v. Nicholas Trevino Forwarding Agency, Inc.*, 888 S.W.2d 86, 88 (Tex. App. – San Antonio 1994, no writ).[4]

Another factor compels us to conclude Balogh did not have notice of the trial setting. After Balogh filed his answer, Ramos requested the docket control conference, which the trial court set for January 7, 1997. Ramos's counsel, Carlos Quintana, was to initiate the telephone call for the conference. "Elizabeth," from Quintana's office, participated for Ramos, but no one was "present" for Balogh. According to the court's docket sheet, Elizabeth informed the court that no telephone number was available for Balogh.

---

[4] In *Ruiz*, a case involving the granting of summary judgment based on deemed admissions, the filing of a certificate of service by Ruiz created a presumption of service of admissions upon Nicolas Trevino Forwarding. Nicholas Trevino Forwarding presented evidence of non-service in the form of an affidavit by the attorney for another party to suit, Justa Truck. Relying on the supreme court's holding in *Cliff*, the San Antonio court held "the affidavit is sufficient to rebut the presumption of service created by the certificate attached to Ruiz's Responses to the Requests for Admissions. . . . " *Ruiz*, 888 S.W.2d at 88.

In the motion to set aside, Balogh vigorously contested the veracity of Elizabeth's statement. His position is supported by the record, which contains the following documents:

1. The check upon which Balogh stopped payment, and which formed the basis for Ramos's case, is attached as an exhibit to Ramos's original petition. The check contains the telephone number for Kenova Construction.

2. The process server's Affidavit of Due Diligence, filed with the trial court as a part of Ramos's motion for substituted service, reports the telephone number for Kenova Construction, the personal telephone number for Balogh's residence, and Balogh's mobile cellular telephone number. The process server's affidavit further showed that Balogh's personal telephone number was a working number.

3. At trial, Ramos offered as exhibit 2, a telefax cover sheet dated March 15, 1996 from Steve Balogh at Kenova Construction to Ramos. The cover sheet reflects Kenova Construction Company's telephone number and its fax number.

Thus, not only did Ramos have documents which contained Balogh's telephone number, so did the clerk of the court. Yet, it appears no effort was made to contact Balogh so that he could participate in the docket control conference.

We also find significant that, unlike the docket control conference notice and docket control conference letter, both of which show they were sent to Balogh, the

docket control order containing the trial setting date has no notation showing it was mailed to Balogh. The court's docket sheet does not reflect that a copy of the docket control order was sent to Balogh, and no such notice is reflected in any court record.

We conclude the record establishes that Balogh had no notice of the March 17th trial date. The trial court's decision to overrule Balogh's motion to set aside is in conflict with the Untied States Supreme Court's decision in *Paralta* and the Texas Supreme Court's opinion in *Lopez* and constitutes an abuse of discretion. Accordingly, we sustain Balogh's first point of error. The judgment of the trial court is REVERSED and the case REMANDED for a new trial.

Nelda V. Rodriguez
Justice

Publish.
Tex. R. App. P. 47.3.

Opinion delivered and filed
this the 21st day of May, 1998.

APPENDIX C

(Seal) **OFFICIAL NOTICE**
COURT OF APPEALS
13TH JUDICIAL DISTRICT

November 12, 1998

RE: Case No. 13-97-00461-CV

Style: Balogh, Steven and Kenova Construction Corporation v. Ramos, Richard

The appellants' second motion for rehearing in the above cause was this day OVERRULED by this Court.

T. C. Case # C-2109-96-B CATHY WILBORN, CLERK

13TH COURT OF APPEALS
10TH FLOOR
NUECES COUNTY COURTHOUSE
CORPUS CHRISTI, TEXAS 78401

MAIL TO:

RUSSELL MANNING
HORNBLOWER MANNING & WARD
1810 AMERICAN BANK PLAZA
P O BOX 2728
CORPUS CHRISTI TX 78403

APPENDIX D

(Seal) **THE SUPREME COURT OF TEXAS**
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

January 28, 1999

Mr. Russell Manning
Demars Hornblower Manning & Ward
P. O. Box 2728
Corpus Christi, TX 78403

Mr. Keith C. Livesay
Stapleton, Livesay & Cowen
1050 North Sugar Road
Suite 200
Pharr, TX 78577

RE: Case Number 98-1150
Court of Appeals Number: 13-97-00461-CV
Trial Court Number: C-2109 96B

Style: STEVEN BALOGH and KENOVA
CONSTRUCTION CORPORATION
v.
RICHARD RAMOS

Dear Counsel:

Today, the Supreme Court of Texas denied the petition for review in the above styled case.

Sincerely,

John T. Adams, Clerk

by /s/ Matthew D. Melton
Matthew D. Melton, Deputy

cc: Ms. Cathy Wilborn, Clerk
Ms. Pauline G. Gonzalez, Clerk

APPENDIX E

(Seal) **THE SUPREME COURT OF TEXAS**
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

March 18, 1999

Mr. Russell Manning
Demars Hornblower Manning & Ward
P. O. Box 2728
Corpus Christi, TX 78403

Mr. Keith C. Livesay
Stapleton, Livesay & Cowen
1050 North Sugar Road
Suite 200
Pharr, TX 78577

RE: Case Number 98-1150
Court of Appeals Number: 13-97-00461-CV
Trial Court Number: C-2109 96B

Style: STEVEN BALOGH and KENOVA CONSTRUCTION CORPORATION
v.
RICHARD RAMOS

Dear Counsel:

Today, the Supreme Court of Texas overruled the motion for rehearing in the above styled petition for review.

Sincerely,

John T. Adams, Clerk

by /s/ Matthew D. Melton
Matthew D. Melton, Deputy

cc: Ms. Cathy Wilborn, Clerk
Ms. Pauline G. Gonzalez, Clerk

APPENDIX F

CAUSE NO. C 2109 96 B

RICARDO RAMOS	§	IN THE DISTRICT
VS.	§	COURT
	§	
STEVEN BALOUGH and	§	93rd JUDICIAL DISTRICT
KENOVA	§	HIDALGO COUNTY,
CONSTRUCTION	§	TEXAS
CORPORATION	§	

FINAL JUDGMENT

CAME ON TO BE CONSIDERED the above referenced case for trial on the merits. The Court, after taking judicial notice of the Court's file, determined that Defendants were properly served, and that Defendants received actual notice of the trial setting.

I.

Plaintiff appeared and announced ready for trial. Defendant's names were called out three time, but they failed to answer or otherwise appear. A jury having been previously demanded, was waived by Plaintiff and by Defendants' failure to appear. Consequently, all issues of law and fact were decided by the trial court.

II.

Plaintiff presented evidence as to both liability and damages. Based on the evidence, the trial court finds that it possesses subject matter jurisdiction. Furthermore, the trial court finds it possessed personal jurisdiction, because Defendants waived any claim that this Court

lacked personal jurisdiction, and because of the facts of this case.

III.

Based on the evidence presented, the court finds that Defendants are liable to Plaintiff, and that Plaintiff has suffered damages. The Court finds that neither E. James Rausch not Plaintiff were negligent, and therefore no reduction of damages is warranted. Furthermore, Defendant's conduct was committed maliciously, willfully and with actual conscious indifference to the rights of Plaintiff, and therefore punitive damages are warranted.

IV.

Based on the evidence presented, it is hereby ORDERED, ADJUDGED and DECREED that Plaintiff, Ricardo A. Ramos recover from Defendants jointly and severally, the sum of $133,750.00 plus pre-judgment interest at the rate of 10% from April 22, 1996, plus all costs of court. All writs necessary for execution of this judgment shall issue. Plaintiff is entitled to post judgment interest at the rate of 10% from the date of this judgment until it is satisfied. Should Defendants appeal to the Court of Appeals, Plaintiff is entitled to an additional award of $15,000.00. Should Defendants file an application for writ of error, Plaintiff should be entitled to an additional $5,000.00 over and above the $15,000.00. Should Defendant's application for writ of error be granted, Plaintiff is entitled to an additional $5,000.00 over and above the awards of $15,000.00 and $5,000.00.

V.

Should Plaintiff be required to file a proceeding in Florida to enforce the judgment Plaintiff will be entitled to an additional award of $10,000.00. Should an appeal of the Florida enforcement proceeding be perfected, Plaintiff will be entitled to an additional award of $15,000.00.

VI.

All other and further relief not granted is DENIED. This is a final judgment.

Signed and entered on this the 28th day of April, 1997.

/s/ Fernando Mancias
JUDGE PRESIDING

CC'S COURT'S FILE
MAY1, 1997

HON CARLOS QUINTANA, NEUHAUS TOWER, STE 1302 MCALLEN, TEXAS 7501
HON STEVEN BALOGH, 7010 BARBOUR ROD, WEST PALM BEACH, FLORIDA, 33407
HON. CARLOS A. RAMOS

APPENDIX G

Cause No. C 2109-96-B

RICARDO RAMOS	§	IN THE DISTRICT COURT
V.	§	
STEVEN BALOUGH and KENOVA CONSTRUCTION CORPORATION	§	HIDALGO COUNTY, TEXAS
	§	93RD JUDICIAL DISTRICT

ORDER DENYING DEFENDANTS' MOTION TO VACATE DEFAULT JUDGMENT AND FOR NEW TRIAL

On this day came to be heard Defendant's Motion to Vacate Default Judgement and for New Trial in the above-styled and numbered cause and having considered same it is the opinion of this Court that said Motion is DENIED.

SO ORDERED in Edinburg, Hidalgo County, Texas, on this the 19th day of Sept, 1997.

/s/ Fernando Mancias
JUDGE PRESIDING

CC'S COURT'S FILE
Sept. 23, 1997

cc: Carlos Quintana, Neuhaus Tower, Suite 1302, McAllen, TX 78501
Steven Balogh, 7010 Barbour Road, West Palm Beach, Florida 33407

APPENDIX H

CIVIL DOCKET

CASE NO. C2109-96-B
DATE FILED 4-22-96

NAMES OF PARTIES	ATTORNEYS	KIND OF ACTION
RICARDO RAMOS	Pltf. CARLOS QUINTANA	DEBT
vs.	Pltf.	
STEVEN BALOGH, ET AL.,	Deft.	Jury Fee $_____
	Deft.	Paid By _____

Date of Entry	Pleas, Process, Service, Motions, Fiats, Orders, Judgments, etc.	Fee Costs	BOOK VOL PAGE
4-22-96	PLAINTIFF'S ORIGINAL PETITION, FILED		
5-2-96	MOTION FOR SUBSTITUTED SERVICE, FILED		
5/6/96	ORDER FOR SUBSTITUTE SERVICE T.R.C.P. 106(b), SIGNED		
5/14/96	CITATION RE", AND FILED. KENOVA CONSTRUCTION CORPORATION, WES ALM BEACH FLORIDA SERVED 5'10/96		
5/14/96	CITATION RETFILED. STEVEN BALOCH, WES PALM BEACH ILORIDA, SERVED 5/10/96		

10/4/96	PLTS MOTION FOR DEFAULT JUDGMENT AND REQUEST FOR HEARING ON UNLIQUIDATED DAMAGES, FILED
10-14-96	Hearing Motion for default and request for hearing on unliquidated damages 10/22/96 at 8:30 am
10/17/96	answer of steven balogh and kenova construction corp. to the plts motion for default judgment, filed
11/26/96	PLTS REQUEST FOR DOCKET CONTROL CONFERENCE FILED
1-7-97	DCC held. TCW: Elizabeth Carlos Quintana. TBT PT-3/10/97 at 900 AM TM-3/17/97 At 900 AM. No deadlines. 3-4 days. No phone # available for Mr. Balogh as per Elizabeth
2/24/97	PLTS FIRST SET OF REQUEST FOR ADMISSION TO DEF STEVEN, BALOGH, FILED
3/17/97	Case called. Plaintiff appeared and waived jury Names of Steven Balogh and Kenova Const. Corp. called and no appearances made James Rausch called as witness. Ricardo Ramos testified as party-plaintiff. Jesus Salinas called to witness stand Keith Livesay called as witness Carlos Quintana testified. Plaintiff rested and closed.

"Court ruled as follows:

(1) Court finds against Defendants on liability issue

(2) Court finds that Defendant Balogh committed fraud and [such] fraud ratified by Kenova Construction Corp.

(3) Plaintiff awarded $5,000.00 plus interest

(4) Plaintiff awarded $30,000.00 as consequential damages

(5) $100,000.00 assessed agst Defendants as exemplary damages

(6) $8,750.00 awarded as atty fees for trial of case

(7) $15,000.00 awarded as atty fees for appeal of case

(8) $5,000.00 awarded as atty fees for application of writ of error

(9) $10,000.00 awarded as atty fees for action in Florida State Court

(10) $15,000.00 awarded as atty fees for appeals in Florida

(11) All costs assessed agst Defendants

/initialed by Judge Mancias/"

APPENDIX I

FERNANDO G. MANCIAS
93RD JUDICIAL DISTRICT COURT
100 N CLOSNER
EDINBURG, TX 78539
DECEMBER 9, 1996
C 2109 96 B
RICARDO RAMOS
VS
STEVEN BALOGH, ET AL

Dear Counsel:

As requested by Carlos Quintana, the above numbered and styled cause has been set on the 7th day of January, 1997 at 3:00 P.M., for the following:

DOCKET CONTROL CONFERENCE, Mr Carlos Quintana will initiate call if one is necessary.

Attendance by lead counsel or by co-counsel, who is completely familiar with the case and fully authorized to act in all matters concerning the case is required. Failure to attend without good cause may result in the case being dismissed for want of prosecution, re-scheduled for an additional hearing or set for trial at the convenience of counsel present, or any other action authorized by the Hidalgo County Court Rules, at the discretion of the Judge.

If the above conflicts with prior commitments, please contact the Court Coordinator immediately. Failure to do so will be taken an indication of your availability.

/s/ Alde Salinas
Alde Salinas
Assistant Court Coordinator
93rd District Court

Hon Carlos Quintana, Neuhaus Tower, Suite 1302, McAllen, TX 78501
Hon Steven Balogh, 7010 Barbour Road, West Palm Beach, Florida 33407

APPENDIX J

C2109 96 B

RICARDO FLORES	IN THE 93RD JUDICIAL
VS	DISTRICT COURT OF
STEVEN BALOGH, ET AL	HIDALGO COUNTY, TEXAS

DOCKET CONTROL ORDER

BE IT REMEMBERED that on this day a Docket Control Conference was held in the above entitled and numbered cause. Appearances were made by

Hon Carlos Quintana Mr. Steven Balogh (Pro Se)

The following was ordered by the Court:

A. Pre-Trial Conference is set for 10th day of March, 1997 at 9:00 o'clock A.M.

B. The deadline for completion of discovery is:

C. The deadline for supplemental and amended pleadings is:

D. The deadline for Designation of Experts and Expert Reports:

E. The deadline for joinder of additional parties is:

F. The case is set for trial before the Jury on the 17th day of March, 1997 at 9:00 o'clock A.M.

G. The trial is estimated to last 3-4 days.

H. OTHER:

I. MEDIATION IS HEREBY ORDERED TO BE CONDUCTED NO LATER THAN FIFTEEN DAYS BEFORE TRIAL DATE.

THIS IS MANDATORY.

Signed this the 7th day of January, 1997.

/s/ Alde Salinas
Alde Salinas
Assistant Court Coordinator

APPROVED:
tcw: Elizabeth (Carlos Quintana)

(*No phone number available for Mr. Balogh as per Elizabeth. Although Notice for Docket Control Conference was sent to Mr. Balogh.)

APPENDIX K

CAUSE NO. C-2109-96-B

RICARDO RAMOS	§	**IN THE DISTRICT COURT**
VS.	§	**93rd JUDICIAL DISTRICT**
STEVEN BALOGH and KENOVA CONSTRUCTION CORPORATION	§	**HIDALGO COUNTY, TEXAS**

PLAINTIFF'S FIRST SET OF REQUEST FOR ADMISSIONS TO DEFENDANT STEVEN BALOGH

(Filed Feb 24, 1997)

TO: Defendant, **STEVEN BALOGH**, Pro-Se
7010 Barbour Road
West Palm Beach, Florida 33407

COMES NOW, **RICARDO RAMOS**, Plaintiff herein and pursuant to Rule 169 of the Texas Rules of Civil Procedure, files these her attached Request for Admissions to be propounded to Defendant **STEVEN BALOGH**. These requests are being served upon the attorney of record for the Defendant, and you are notified that the Plaintiff specify that the answers shall be served upon the first business day after the expiration of thirty (30) days after the service of said Request for Admissions. These Requests shall be answered separately and fully in

writing under oath and signed by the person making them.

Respectfully submitted.

LAW OFFICES OF
CARLOS QUINTANA, P.C.
Neuhaus Tower, Suite 1302
200 S. 10th Street
McAllen, TX 78501
(210) 687-9729
(210) 687-9760 FAX

BY: /s/ Carlos Quintana
CARLOS QUINTANA
State Bar No: 16436345

CERTIFICATE OF SERVICE

I certify that a copy of the above and foregoing PLAINTIFF'S REQUEST FOR ADMISSIONS has been forwarded by Certified Mail, Return Receipt Requested to:

Mr. Steven Balogh
7010 Barbour Road
West Palm Beach, FL 33407

Kenova Construction Corporation
7010 Barbour Road
West Palm Beach, FL 33407

on this 21 day of Feb, 1997.

/s/ Carlos Quintana
CARLOS QUINTANA

DEFINITIONS

1. As used herein, the terms "Plaintiff" shall mean RICARDO RAMOS.

2. As used herein, the terms **"BALOGH"** shall mean Defendant, **STEVEN BALOGH,** the term "KENOVA", shall mean Defendant, **KENOVA CONSTRUCTION,** including any and all agents, employees, representatives or attorneys of Defendants, and all other persons or entities acting or purporting to act for or on behalf of said Defendants, whether authorized to do so or not.

3. As used herein the term "you" or "your" refers to the person or entity to whom this discovery is directed.

4. As used herein, the term "statement" refers to:

   (a) any written statement signed or otherwise adopted or approved by the person making it, and

   (b) a stenographic, mechanical, electrical or other type of record, or any transcription therof which is a substantially verbatim recital of a statement made by the person and whom contemporaneously recorded.

5. As used herein, the term "Occurrence in question" refers to the meeting between Plaintiff and Defendant Steven Balogh which occurred on or about March 18, 1996 at the Law Office of Ricardo Ramos, Neuhaus Tower, Suite 1300, Hidalgo County, Texas.

REQUEST FOR ADMISSIONS

REQUEST FOR ADMISSION NO. 1:

Admit or Deny that on March 15, 1996, you were the president of Kenova Construction Corporation.

RESPONSE:

REQUEST FOR ADMISSION NO. 2:

Admit or Deny that you contacted Plaintiff by and through Mr. Jim Rausch on or about March 15, 1996.

RESPONSE:

REQUEST FOR ADMISSION NO. 3:

Admit or Deny that on or about March 15, 1996 you asked that Plaintiff pay $5,000.00, out of his own monies, to a gentleman by the name of Lic. Heron Gomez.

RESPONSE:

REQUEST FOR ADMISSION NO. 4:

Admit or Deny that although Plaintiff asked you to wait, because he could reduce the $5,000.00 fee, you insisted that he pay it.

RESPONSE:

REQUEST FOR ADMISSION NO. 5:

Admit or Deny that you provided Plaintiff with authority from Kenova Construction to pay the requested $5,000.00.

RESPONSE:

REQUEST FOR ADMISSION NO. 6:

Admit or Deny that you offered to pay Plaintiff for the service performed by him.

RESPONSE:

REQUEST FOR ADMISSION NO. 7:

Admit or Deny that on or about March 18, 1996 you arrived at Plaintiff's office in McAllen, Texas to retreive [sic] the checks.

RESPONSE:

REQUEST FOR ADMISSION NO. 8:

Admit or Deny that you gave Plaintiff a check from Kanova Construction Corporation Checking Account, check number 1389 in the amount of $5,000.00.

RESPONSE:

REQUEST FOR ADMISSION NO. 9:

Admit or Deny that you never intended to pay Plaintiff the $5,000.00 you asked that he pay for you to Mr. Gomez.

RESPONSE:

REQUEST FOR ADMISSION NO. 10:

Admit or Deny that you stopped payment on check number 1389, made payable to Ricardo Ramos.

RESPONSE:

APPENDIX L

KASSAB ARCHBOLD & O'BRIEN, L.L.P.
ATTORNEYS AND COUNSELORS AT LAW

214 NORTH JACKSON STREET
P.O. BOX 826
MEDIA, PENNSYLVANIA 19063

(670) 565-3800

(800) 848-8597

FAX (670) 892-8888

[Names Omitted In Printing]

March 14, 1997

VIA FACSIMILE (210) 687-9760
Carlos Quintan, Esquire
LAW OFFICES OF CARLOS QUINTANA, P.C.
Neuhaus Tower, Suite 1302, 200 S. 10th Street
McAllen, TX 78501

Re: Ricardo Ramos v. Steven Balogh and Kenova Construction Corporation Case No. C-2109-96-B

Dear Mr. Quintan:

Kenova Construction asked me to go over their proposed responses to your Request for Admissions. I have reviewed them and I am forwarding them to you which I have signed as general counsel for the corporation. Under separate cover you will receive a Verification from Mr. Balogh as the corporate president.

Mr. Balogh asked that I pass along to you the fact that by signing and submitting these Request for Admissions, Mr. Balogh is in no way consenting to the jurisdiction of the State of Texas for this matter.

Mr. Balogh suggests that Mr. Ramos look to Mr. James Rausch, Esquire, his law partner, to recover the monies being claimed in this litigation in that the damages suffered by Mr. Ramos were suffered as a result of the negligence of his law partner, James Rausch.

Mr. Balogh wants to make sure that you understand that he is not consenting to the jurisdictional State of Texas and if in fact a judgment is obtained in this matter, any attempt to register the judgment in the state of Florida will be vigorously defended on a lack of jurisdiction grounds as well as on grounds that there is no personal jurisdiction over Mr. Balogh as he is a citizen of the State of Florida.

Very truly yours,

/s/ Kevin William Gibson
KEVIN WILLIAM GIBSON

KWG: deb
cc: Steven Balogh, Kenova (w/enc.)
Enclosure

APPENDIX M

AFFIDAVIT

After being duly sworn according to law, Steven Balogh on his own behalf, and in his capacity as President of Kenova Construction does depose and say:

1. He and Kenova Construction are named Defendants in certain litigation filed against him by Ricardo Ramos in the 93rd Judicial District Court of Hildago County in the State of Texas at Court Term and No. C2109 96B.

2. Your deponent never received a copy of the Court's Docket Control Order, signed and dated January 7, 1997, indicating that a trial was set for 9:00 a.m. on March 17, 1997.

3. To the best of your deponent's information, knowledge and belief, the aforementioned Docket Control Order was not mailed to your deponent's place of business at Kenova Construction at 7010 Barbour Road, West Palm Beach, Florida 33407.

4. Your deponent made an investigation of the file being maintained at the offices of Kenova Construction regarding the Ramos lawsuit, and in said file there is no copy of the aforementioned Docket Control Order.

5. Your deponent made inquiry of Kenova Construction employees who customarily open and review correspondence sent to Kenova and, as a result of this investigation, no employee at Kenova Construction recalls seeing the aforementioned Docket Control Order.

6. A review of the litigation file discloses that the last communication that Kenova Construction had from

the 93rd Judicial District Court was a letter dated December 9, 1996 under the signature of Alde Salinas, Assistant Court Coordinator for the 93rd District Court, advising that a docket control conference had been requested by counsel for Mr. Ramos and it appeared from the face of this letter that the docket control conference would be conducted by telephone, with provisions that Mr. Carlos Quintana, Esquire would "initiate" the telephone call.

7. No telephone call was "initiated" by Carlos Quintana to set up a docket control conference with your deponent or any representative of Kenova Construction.

8. The first time that your deponent saw the Docket Control Order of January 7, 1997 was antecedent to the trial date of March 17, 1997, at which time it was forwarded to me after being procured by counsel that your deponent has hired in Texas for purposes of filing a motion for a new trial and/or an appeal of the decision rendered on March 17, 1997. My antecedent review of the Docket Control Order of January 7, 1997 reinforces in the mind of your deponent that he never saw said Order due to certain inconsistencies in said Order as set forth below:

> (a) The Docket Control Order does not contain the correct caption of the subject matter litigation in that it indicates that the Plaintiff in the litigation is "Ricardo Flores". Your deponent never had any dealings with any individual from the State of Texas by the name of Ricardo Flores; and
>
> (b) The Docket Control Order of January 7, 1997 states in the first paragraph of said Order that your deponent had made an appearance at the "docket control conference", when in fact

your deponent never made any appearance at any docket control conference; and

(c) In subparagraph "I", it is provided that a "mandatory" mediation was to be conducted fifteen (15) days prior to the trial date set forth in said Docket Control Order when in fact no such mediation was conducted. Nobody contacted your deponent or any employee or representative of Kenova Construction advising of a mediation. Had your deponent known of the opportunity to mediate this dispute, and being of the mind that your deponent's total exposure in the matter was Five Thousand Dollars ($5,000.00), your deponent would have been of a mind to have a settlement discussion/mediation to resolve this dispute. The fact that mediation would have been an available alternative to trial would have caused your deponent to specifically recall the contents of any Docket Control Order providing for mandatory mediation; and

(d) The Docket Control Order of January 7, 1997, at the bottom of said Order, indicates that there was no telephone number available to contact your deponent regarding the scheduling of trial. Your deponent knows that this cannot be accurate information. In the first instance, the Plaintiff, Ricardo Ramos, certainly knew your deponent's telephone number in that Mr. Ramos telephoned your deponent on at least one occasion. Upon information and belief, facsimile cover sheets bearing Kenova's telephone number were sent to counsel for Mr. Ramos, Carlos Quintana during the course of this litigation. In the Petition to take a default judgment filed in this matter plaintiff attached an affidavit of a process server wherein the server sets forth

not only the business telephone number for Kenova but your deponents home number and car phone number as well. Lastly, your deponent's telephone number is clearly set forth on the subject matter check which gives rise to this controversy, said check being attached at Exhibit "D" to the Plaintiff's original Complaint/Petition. Thus, the Docket Control Order is in your deponent's opinion is inaccurate on its face in that it purports to have been prepared and approved with the input of your deponent when in fact it was not. If "Elizabeth" as her name appears in the Docket Control Order is an employee of Counsel for the plaintiff and Elizabeth advised the Court that there was no available phone number for your deponent, then it would be your deponent's opinion that the statement being attributed to Elizabeth in the Order was a misrepresentative communication to the Court; and

(e) Your deponent clearly was unaware of a trial date in that counsel for the Plaintiff served a Request for Admissions upon your deponent on February 21, 1997, which would have provided for an answering deadline of March 21, 1997, which would have been a date after the scheduled date for trial. Simply stated, if your deponent knew that a trial date was scheduled for March 17, 1997, then your deponent wouldn't have gone to the trouble to answer a Request for Admissions that would not have been chronologically due until after the date for trial, as scheduled by the Docket Control Order of January 7, 1997; and

(f) If your deponent had seen the Docket Control Order your deponent would have been

puzzled by subsection G of said Order which provided that the scheduled trial was to consume three to four trial days. Based upon your deponents involvement in other commercial litigation, your deponent would never anticipate that this controversy which from your deponents perception involved a total in dispute of $5000.00 would consume three to four trial days to resolve.

9. Your deponent believes, and therefore avers, that your deponent has a valid malpractice claim to assert as a defense and/or offset to the claims asserted against him and Kenova. It was never your deponent's intent to avoid a final judicial resolution of this matter in that it was your deponent's hope and intent to settle this matter prior to a judicial resolution, the fact of which was communicated on a number of occasions to Plaintiff's counsel. Again, and not to be redundant, the mandatory mediation provisions in the Docket Control Order would have been something your deponent would have seized upon to accomplish a settlement had your deponent been aware of the fact that mediation was required alternative.

10. Your deponent believes, and therefore avers, that your deponent has a valid defense to the claims of fraud in that prior to the filing of the Plaintiff's Complaint/Petition general counsel for Kenova, advised Plaintiff's counsel in writing that the stop payment on the subject matter check was done on advice of counsel subsequent to the tendering of said check.

11. Your deponent would be most interested in availing himself of the mandatory court ordered mediation process referenced in subparagraph I of the Docket

Control Order in that your deponent believes that in a case such as this, that mediation could conceivably be a vehicle to dispose of the controversy.

12. Your deponent sayeth nothing further.

/s/ Steven Balogh
STEVEN BALOGH
S.L. Balogh

Sworn to and subscribed
before me this 15 day
of May, 1997
personally known

/s/ Teresa E. Schott
Notary Public
(Seal)

APPENDIX N

CAUSE NO. C-2109-96-B

RICHARD RAMOS	§	IN THE DISTRICT COURT
	§	
vs.	§	93rd JUDICIAL DISTRICT
	§	
STEVEN BALOGH	§	
and KENOVA	§	HIDALGO COUNTY, TEXAS
CONSTRUCTION	§	
CORPORATION	§	

DEFENDANTS' MOTION TO VACATE DEFAULT JUDGMENT AND FOR NEW TRIAL

Now come Defendants, Steven Balogh and Kenova Construction Company, and move the Court to vacate the Court's judgment dated April 28, 1997, and to order a new trial in this cause, with notice to all parties. In support of this motion, Defendants show the Court the following:

1. GROUNDS FOR NEW TRIAL AFTER DEFAULT JUDGMENT

A. Summary of Facts

Plaintiff filed this suit against the Defendants, both of whom are citizens of Pennsylvania, on the basis of a negotiable bank check from Kenova Construction, signed by its president, Steven Balogh, payable to the order of Plaintiff in the amount of $5,000.00 (referred to as the "check"). Plaintiff alleges in his Original Petition that the Defendants intended not to honor the check at the time it was written, and therefore committed fraud on the Plaintiff. As demonstrated by the affidavit of Steven Balogh, attached and made a part of this Motion as ***Exhibit A***,

Defendants were advised by Kenova Construction Corporation's to stop payment **after** tendering the check to the Plaintiff. The Plaintiff's petition prays for actual damages of $5,000.00 (the face amount of the check), unspecified consequential damages, punitive damages of $100,000.00, and attorney's fees.

Based upon a process server's "Affidavit of Due Diligence" [attached to this motion as ***Exhibit B***], the Court authorized service of process on the Defendants by publication. The Defendants failed to file an answer after citation was published, and the Court set this case for a hearing on the Plaintiff's Motion for Default Judgment. Prior to the hearing on the Motion for Default Judgment, the Defendants appeared in the case by filing a pleading entitled "Answer of Steven Balogh and Kenova Construction Corporation to the Plaintiff's Motion for Default Judgment." [attached to this motion as ***Exhibit C***]. In their answer, the Defendants denied having been served with process in this case, denied that they were amenable to jurisdiction in Texas, moved the Court to dismiss the case for lack of jurisdiction, and requested time to file a Motion to Dismiss if the Court desired more briefing on the jurisdictional issues.

After the Defendants made their appearance, the Plaintiff requested a docket control conference, and on December 9, 1996, the Court issued an "Order Setting Docket Control Conference" [see ***Exhibit D***, referred to as the "DCC Notice"], setting the case for a docket control conference on January 7, 1997. A copy of the DCC Notice was sent to the Defendants. Accompanying the Order Setting Docket Control Conference was a letter from Aide Salinas, Assistant Court Coordinator for the 93rd District

Court [see ***Exhibit E***, referred to as the "DCC Letter"], explaining that Plaintiff's counsel, Mr. Carlos Quintana, was required to initiate the telephone conference call, if necessary.

The Court conducted the docket control conference by telephone, as reflected by the Court's Civil Docket Sheet. [See ***Exhibit F***]. The Civil Docket Sheet reflects that "Elizabeth" from Carlos' Quintana's office participated in the telephone conference, and that nobody participated in the conference on behalf of the Defendants. According to the Docket Sheet, Elizabeth informed the Court that no telephone number was available for Mr. Balogh. This representation to the Court was false. Not only did Mr. Quintana have the Defendants' telephone numbers, those numbers are correctly stated in pleadings, exhibits, and affidavits filed with the Court before the date of the docket control conference. As demonstrated by the Affidavit of Steven Balogh, Mr. Ramos, the Plaintiff, and his attorney, Mr. Quintana, knew Mr. Balogh's telephone number. Moreover, the Court's file shows that, at a minimum, Defendants' telephone numbers were available to Plaintiff from the following sources before the docket control conference:

(1) The check upon which Defendants stopped payment, and which forms the basis of the Plaintiff's case, is attached as "Exhibit D" to the Plaintiff's Original Petition, and as ***Exhibit G*** to this Motion. The check correctly reflects the telephone number for Kenova Construction;

(2) The federal express receipt for the answer filed by the Defendants on October 17, 1996

[attached as ***Exhibit H***], contains the phone number for Kenova Construction;

(3) The process server's Affidavit of Due Diligence [***Exhibit B***], filed with the Court on May 2, 1996 with the Plaintiff's Motion for Substitute Service, reports the telephone number for Kenova Construction, the personal telephone number for Mr. Balogh's residence, and Mr. Balogh's mobile cellular phone number. The process server's affidavit further shows that Mr. Balogh's personal telephone number was a working number, and Mr. Balogh's affidavit establishes that the number for Kenova Construction was a working number.

(4) Plaintiff's Exhibit 2, which Plaintiff offered at the trial on March 17, 1997 [attached to this motion as ***Exhibit I***], is a telefax cover sheet dated March 15, 1996 from Steve Balogh at Kenova Construction to the Plaintiff, Rick Ramos. The cover sheet correctly reflects Kenova Construction Corporation's telephone number and its telefax number.

As a result of the docket control conference, the Court issued a Docket Control Order [see ***Exhibit J***], setting this cause for trial on March 17, 1997. The Docket Control Order with notice of the trial setting was never served on the Defendants. [See ***Exhibit A***. *Affidavit of Steven Balogh,* verifying that Defendants never received notice of the trial setting or the Docket Control Order]. The Docket Control Order in the Court's file for this case

confirms that Mr. Balogh did not participate in the telephonic docket control conference due to the representation by Elizabeth that no phone number for Mr. Balogh was available. Unlike the DCC Notice and the DCC Letter, both of which show that they were sent to Mr. Balogh, the Docket Control Order has no notation showing that it was mailed to the Defendants. The Court's Docket Sheet does not reflect that a copy of the Docket Control Order was sent to the Defendants, and no such notice to the Defendants is reflected in any other of the Court's records for this case.

The Docket Control Order also orders mandatory mediation of the dispute no later than 15 days before the trial date. The Defendants, who would have welcomed the opportunity to mediate the dispute, were never aware of the Court order requiring mediation. Obviously, Plaintiff made no effort to contact Defendants to discuss mediation, and took no action to comply with the Court's order for mandatory mediation.

On March 17, 1997, without any notice to the Defendants of the trial setting, the Court called the case for trial. Unaware that the case was set for trial, the Defendants did not appear, and the Court granted judgment against them on April 28, 1997. [See ***Exhibit K***]. The Judgment shows that a copy of the Judgment was mailed to the Defendants. In fact, the Court's file affirmatively reflects that other pleadings and notices were served on the Defendants, **except for the docket control order setting the case for trial.**

b. Legal Standard for New Trial after Post-Answer Default Judgment.

A judgment after default of the defendant must be set aside and a new trial ordered when (1) the defendant's failure to appear or answer was "not intentional, or the result of conscious indifference on his part, but was due to a mistake or accident," (2) "the motion for new trial sets up a meritorious defense," and (3) granting the motion for new trial "will occasion no delay or otherwise work an injury to the plaintiff." *Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d 124, 126 (Tex. 1939). The same standards ordinarily apply to a motion for new trial after judgment due to a post-answer default. *Cliff v. Huggins*, 724 S.W.2d 778, 779 (Tex. 1987).

However, when as here, the failure to appear at a trial or hearing is due to lack of adequate notice of the trial setting, sustaining judgment would violate the defendant's constitutional due process rights. *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 108 S.Ct. 896, 899, 99 L.Ed.2d 75 (1988); *Armstrong v. Manzo*, 380 U.S. 545, 550, 85 S.Ct. 1187, 1190 (1965); *Lopez v. Lopez*, 757 S.W.2d 721, 723 (Tex. 1988) (per curiam); *Gonzalez v. State*, 832 S.W.2d 706, 707 (Tex. App. – Corpus Christi 1992, no writ). Accordingly, a defendant who did not receive notice of the trial is entitled to a new trial without showing a meritorious defense or the absence of delay or other prejudice to the plaintiff's rights. *Lopez*, 757 S.W.2d at 723; *Mosser v. Plano Three Venture*, 893 S.W.2d 8, 12 (Tex. App. – Dallas 1994, no writ) (considerations of delay or prejudice to the plaintiff cannot overcome the defendant's

right to notice as a fundamental component of due process); *Green v. McAdams*, 857 S.W.2d 816, 819 (Tex. App. – Houston [1st Dist.] 1993, no writ) (when defendant did not receive notice of trial, "it would violate due process to require the *Craddock* elements as a prerequisite to the granting of a new trial.").

c. The Defendants' failure to appear was due to the lack of notice, and was neither intentional nor the result of conscious indifference by the Defendants.

As demonstrated by the affidavit of Steven Balogh and the record in this cause, the Defendants received no notice whatsoever of the March 17, 1997 trial setting. The mere fact that Defendants had notice that the trial date would be set at the docket control conference does not satisfy the requirement of due process because Defendants did not receive actual notice of the trial setting. *Green*, 857 S.W.2d at 819. The notice of the docket control conference is particularly inadequate in this case, since it provides that the plaintiff's counsel was required to initiate the telephone conference call, if necessary. Although a representative of plaintiff's counsel did initiate the call, the docket control conference proceeded without the participation of the Defendants, based upon a false representation that the Defendants' phone numbers were "unavailable."

Moreover, on February 21, 1997, after the case had been set for a March 17, 1997 trial without notice to the Defendants, Plaintiff served a set of Requests for Admissions on Defendants, instructing them to provide answers

on March 21, 1997, four days after trial. Unaware of the trial setting. Defendants served Plaintiff with answers to this discovery process. The issuance of discovery process in this manner was further calculated to reinforce Defendants' unawareness of the trial setting.

Because the Defendants were not given actual notice of the trial setting, the judgment violates the Defendants' constitutional rights to due process and must be set aside on that basis alone. *Peralta,* 485 U.S. 80; *Armstrong,* 380 U.S. at 550; *Lopez,* 757 S.W.2d at 723; *Gonzalez,* 832 S.W.2d at 707; *Mosser,* 893 S.W.2d at 12; *Green,* 857 S.W.2d at 819.

d. The Defendants have a meritorious defense.

Although Defendants are not required to establish a defense as a prerequisite to a new trial in this case, the affidavit of Steven Balogh establishes a meritorious defense to the fraud action: the decision to stop payment on the subject check was made after it was tendered to the Plaintiff and after Plaintiff had performed the alleged services for the Defendants. This evidence controverts the Plaintiff's allegation of fraudulent intent at the time that Defendants allegedly promised to pay the Plaintiff. In addition, the fact that Defendants tendered payment after the alleged services were performed is an indication that Defendant intended to make the payment at the time of the original promise (although this promise was made under duress upon coercion by the Plaintiff). Furthermore, Texas case law clearly provides that stopping payment on a check gives rise to an action sounding in contract, and cannot be the basis of a fraud action or punitive damages, even when there is a jury finding that

the issuer of the instrument intended to stop payment at the time it was issued. *McDonough v. Zamora*, 338 S.W.2d 507, 514 (Tex. Civ. App. – San Antonio 1960, writ ref'd, n.r.e.). Punitive damages simply cannot be recovered in an action for breach of contract. *Id.; Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 618 (Tex. 1986). Consequential damages such as loss of business reputation, also are not recoverable as damages for breach of contract. *See Rubalcaba v. Pacific/Atlantic Crop Exchange, Inc.*, ___ S.W.2d ___, 1997 WL 99716 at p. 7 (Tex. App. – El Paso 1997, n.w.h.); *Sterling Projects, Inc. v Fields*, 530 S.W.2d 602 (Tex. Civ. App. – Waco 1975, no writ); *Nelson v. Data Terminal Systems, Inc.*, 762 S.W.2d 744, 748 (Tex. App. – San Antonio 1988, writ denied).

There is no evidence to support the Plaintiff's allegation of fraud or the award of punitive damages. Exemplary damages cannot be admitted by a default. *Sunrizon Homes v. Fuller*, 747 S.W.2d 530, 534 (Tex. App. – San Antonio 1988, writ denied). In addition, fraud is never presumed, but must be proven by evidence of every element of the tort. *Stephanz v. Laird*, 846 S.W.2d 895, 903 (Tex. App. – Houston [1st Dist. 1993, writ denied). In this case, the only allegation or evidence of fraud is that Defendants stopped payment on the check issued to the Plaintiff. Failure to perform a future act is fraud only when there is no intent to perform the act at the time the representation is made. *Schindler v. Austwell Farmers Coop*, 841 S.W.2d 853, 854 (Tex. 1992). The mere failure to perform, such as the stopping payment of the check issued to the Plaintiff, is not evidence of fraudulent intent at the time the performance was promised. *Spoljaric v. Percival Tours, Inc.*, 708 S.W.2d 432, 435 (Tex. 1986); *see also*

McDonough, 338 S.W.2d at 514 (intent to stop payment at the time a check is issued is a breach of contract, not fraud). To the contrary, the issuance of the check after the services were performed is evidence that Defendants intended to pay as promised, especially considering that Defendants stopped payment in good faith reliance on legal advice given by counsel **after the check was issued**.

The judgment in this case awards damages for both breach of contract and fraud. Such a recovery is not permitted, as Plaintiff is required to elect recovery under either his contract claim or his fraud claim. Although attorney's fees may be recovered in a contract action, they are not recoverable in a tort action. *Villasenor v. Villasenor*, 911 S.W.2d 411, 420 (Tex. App. – San Antonio 1995); *Huddleston v. Pace*, 790 S.W.2d 47, 49 (Tex. App. – San Antonio 1990, writ denied). If Plaintiff chooses recovery under his contract theory, he is not entitled to punitive damages. *See Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d at 618. If he elects recovery under his tort theory, he is not entitled to attorney's fees. The Court's judgment erroneously awards both attorney's fees for breach of contract and punitive damages. *See American Nat. Petroleum Co. v. Transcontinental Gas Pipe Line Corp.*, 798 S.W.2d 274, 283 (Tex. 1990) (plaintiffs "cannot receive both their actual damages in contract and their actual damages in tort without receiving a double recovery.").

2. POINTS OF ERROR THAT REQUIRE A NEW TRIAL

On the basis of the foregoing legal arguments and authorities, Defendants assert the following points of error in the trial court's judgment:

POINT OF ERROR NO. 1: The judgment violates the Defendants' federal and state constitutional rights to due process of law because Defendants had no notice of the trial.

POINT OF ERROR NO. 2: The damages awarded in the judgment are manifestly too large.

POINT OF ERROR NO. 3: The evidence was legally and factually insufficient to support a finding that Plaintiff suffered consequential damages because Defendants stopped payment of the check written to Plaintiff.

POINT OF ERROR NO. 4: The evidence was legally and factually insufficient to support a finding that Defendants committed fraud.

POINT OF ERROR NO. 5: The evidence was legally and factually insufficient to support a finding that Defendants made any misrepresentation of material fact to the Plaintiff.

POINT OF ERROR NO. 6: The evidence was legally and factually insufficient to support a finding that Defendants intended either not to reimburse Plaintiff or not to honor the check in question when it was delivered to Plaintiff.

POINT OF ERROR NO. 7: The evidence was legally and factually insufficient to support a finding that Plaintiff took any action to his detriment in reliance upon the Defendants' delivery of the check.

POINT OF ERROR NO. 8: The evidence and pleadings were legally and factually insufficient to support a finding that James E. Rausch and Plaintiff were not negligent.

POINT OF ERROR NO. 9: The evidence was legally and factually insufficient to support a finding that Defendants acted willfully, maliciously, or with actual conscious indifference to the rights of Plaintiff.

POINT OF ERROR NO. 10: The evidence was legally and factually insufficient to support the Court's award of attorney's fees.

POINT OF ERROR NO. 11: As a matter of law, Plaintiff is not entitled to a combined recovery of tort and contract damages.

POINT OF ERROR NO. 12: As a matter of law, Plaintiff is not entitled to recover both punitive damages and attorneys' fees.

POINT OF ERROR NO. 13: As a matter of law, stopping payment on a negotiable instrument is not actionable as fraud, even if there was an intent to stop payment at the time the check was delivered.

POINT OF ERROR NO. 14: As a matter of law, stopping payment on a negotiable instrument is actionable only under as breach of contract, and punitive damages are not recoverable.

POINT OF ERROR NO. 15: As a matter of law, stopping payment on a negotiable instrument is not actionable as fraud, and consequential damages, such as damage to business reputation, are not recoverable.

POINT OF ERROR NO. 16: As a matter of law, stopping payment on a negotiable instrument is not actionable if the issuer of the instrument has a valid defense to payment.

POINT OF ERROR NO. 17: As a matter of law, the failure to perform a future act, such as by stopping payment on a negotiable instrument given to pay a debt, is not evidence of fraud.

POINT OF ERROR NO. 18: The judgment violates Defendants' federal and state constitutional rights to due process of law and open access to the courts because it punishes Defendants for exercising their rights to appeal by increasing the award of damages for each action taken by Defendants to appeal the judgment.

PRAYER FOR RELIEF

For the reasons set forth above, Defendants, respectfully request the Court to set aside its judgment in this case, order a new trial with notice to all parties, and upon such trial award judgment that Plaintiff take nothing on his claims, that Defendants have recovery on their

counterclaims, together with costs of court and such other and further relief to which they may be entitled.

Respectfully submitted,

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By /s/ Russell Manning
Russell Manning
State Bar No. 12958710

CERTIFICATE OF SERVICE

I certify that on May 27, 1997, a complete and correct copy of the foregoing pleadings was served on each party by delivery to the following attorneys of record in the manner indicated below:

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Certified Mail, RRR No. P 104 346 676
Mr. Carlos Quintana
Law Offices of Carlos Quintana, P.C.
Neuhaus Tower, Suite 1302
200 S. Tenth Street
McAllen, TX 78501

/s/ Russell Manning
Russell Manning